

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Jaciel Corral-Cinco,

Defendant.

CR 15-02312-TUC-CKJ(LAB)

**REPORT AND RECOMMENDATION**

The District Court referred this case to the Magistrate Judge for a hearing on the defendant's motion to suppress evidence and statements. The defendant, Jaciel Corral-Cinco, argues that all evidence obtained as a result of his illegal stops on November 30, 2015 must be suppressed because he was stopped without reasonable suspicion and arrested without probable cause, in violation of his Fourth Amendment rights. (Doc. 25).

An evidentiary hearing was held on July 26 and 27, and August 12, 2016. United States Border Patrol (USBP) Agents Justin Sanders and Samuel Schultz, and the defendant, each testified. Government's Exhibits 1 through 5 and 8, and Defendant's

1 Exhibits 2 and 5 through 8, were admitted for purposes of this hearing only.<sup>1</sup>

2 **Charge:**

3 The defendant is charged in a two count indictment with conspiracy to possess with  
4 intent to distribute, and possession with intent to distribute, 50 kilograms or more of  
5 marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

6 **Motion to Suppress:**

7 The defendant argues that his Fourth Amendment rights were violated when he was  
8 stopped twice by police without reasonable suspicion, and ultimately arrested without  
9 probable cause, on November 30, 2015. He asserts that any evidence obtained as a result  
10 of the illegal stops and arrest must be suppressed.

11 The Court concludes the initial seizure was a valid *Terry* stop. After the defendant and  
12 his companion were released, they were stopped a second time based on reasonable  
13 suspicion. This second stop ripened into an arrest based on probable cause. The search  
14 of the defendant's pocket was a search incident to an arrest. The defendant's statements  
15 were made after valid *Miranda* warnings, and subsequent to a lawful arrest. The evidence  
16 should be admitted at trial.

17 **EVIDENCE:**

18 **Justin Sanders**

19 Justin Sanders is a USBP agent with seven years' experience. He has been stationed in  
20 Nogales, AZ during his seven-year tenure, working in various units. Sanders testified  
21 that on 11/30/15 he was working in the community policing unit with USBP Agent  
22 Schultz. Sanders received a call from Nogales Police Department dispatch advising him  
23 that a concerned citizen called regarding people hiding in the brush on the west side of  
24 Target Range Road and Industrial Park Avenue, about one mile north of the international  
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26 <sup>1</sup> Government's Exhibit 8 consists of two DVDs which the Court reviewed in chambers after the hearing. The DVDs  
27 have limited value due to the grainy quality of the images. No testimony was presented to explain what the DVDs  
depict. The Court was unable to identify specific people and had difficulty identifying locations and specific vehicles.

1 border. That is an area where interdiction of drugs and undocumented people is common.  
2 It is near a small cluster of buildings, small businesses and warehouses. Agent Sanders  
3 was given no description of the people, or information about the number of people seen.

4 Sanders testified that when he and Schultz arrived in the area of Industrial Park Avenue  
5 and Target Range Road in a marked Border Patrol vehicle, Sanders saw two people try to  
6 “hide” behind a brick pillar, out of the agents’ view. That characterization is not entirely  
7 credible based on the agents’ testimony that the men were taller than the pillar and were  
8 looking at the agents. The court concludes that the men were simply trying to make  
9 themselves look less conspicuous. Sanders testified that there were no other people near  
10 the businesses. Government’s Exhibit 1 shows the area where the defendant and his  
11 companion were first seen by the agents.

12 Government’s Exhibit 8 is a video taken of the opposite side of the building. It shows a  
13 fair amount of traffic, people coming and going from the daycare center, and a couple of  
14 pedestrians in the area. Apparently there were people in the general vicinity but not in the  
15 agents’ immediate area.

16 Government’s Exhibit 2 shows a warehouse with bay doors. The building is in an “L”  
17 shape. The bay doors are not visible from the street.

18 According to Sanders’s testimony, the agents got out of their vehicle and identified  
19 themselves as USBP agents. Agent Schultz spoke to the defendant and his companion in  
20 Spanish. Both agents were in uniform and were armed. Sanders observed the two men  
21 look at each other before answering questions. They were fidgety, shuffling their feet, and  
22 making no eye contact. In Agent Sanders’s experience, some people legally in the  
23 country are nervous and fidgety when they have contact with border patrol agents.  
24 Sanders identified the defendant in court as one of the men.

25 The men each provided a B1/B2 visa when asked if they were in the United States (U.S.)  
26 legally. That type of visa does not allow the holder to work in the U.S. Nevertheless, the  
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1 men said they were looking for work. The defendant, however, said he did not know what  
2 kind of work he was looking for. In Agent Sanders's experience, people looking for work  
3 usually know the names of the companies where they plan to look for work. The agents  
4 spoke in friendly voices. The encounter lasted about two minutes, and then Sanders  
5 returned the visas and told the men they were free to leave. The men walked south on  
6 Industrial Park Avenue, toward the border. The two agents went in separate directions.

7 Agent Sanders suspected the men of scouting for drug or alien smugglers, although he  
8 never saw them communicating with anyone else. He walked to the east side of the  
9 building by the bay doors of the warehouse because he had found illegal aliens hiding there  
10 in the past. Sanders approached a white pickup truck, depicted in Government's Exhibit  
11 3, parked with its bed against the warehouse door. He smelled the odor of marijuana  
12 coming from the bed. Sanders lifted the cover and saw bundles of marijuana. He  
13 removed the bundles and searched the cab. The marijuana-laden truck was discovered  
14 about 100 feet and a one minute walk from where the defendant was first contacted.  
15 Sanders notified Agent Schultz of his discovery by radio and asked Schultz to re-contact  
16 the defendant and his companion.

17 Schultz re-contacted the men about five to seven minutes after the first encounter. He  
18 transported both men back to the pickup truck in the back seat of his Tahoe, which has a  
19 secured metal cage. When Sanders approached the Tahoe, the men were out of the vehicle,  
20 one on each side. He can't remember if they were handcuffed.

21 Other agents arrived on scene before Agent Schultz returned. Agent Sanders witnessed  
22 Agent Schultz read the defendant his *Miranda* rights. The statement that followed was not  
23 recorded. The defendant took a key out of his pocket and gave it to Schultz, who gave it to  
24 Sanders, who started the truck with it.

25 Agent Sanders testified he originally made contact with the defendant because of recent  
26 smuggling trends in the area, the call from dispatch, the men's nervous and evasive  
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1 behavior, and because there was no one else in the area. He does not remember if the  
2 defendant had a cell phone. He did not see the defendant communicating with anyone by  
3 phone.

4 **Samuel Schultz**

5 Samuel Schultz has been a Border Patrol agent for ten years at the Nogales Border Patrol  
6 station. During that time he has written about ten to twenty investigative reports. He  
7 never received any training in report writing. Agent Schultz is fluent in Spanish. He  
8 testified that on 11/30/15 he was working in the community policing unit, on the west side  
9 of the DeConcini Port of Entry near the international border. Schultz was patrolling in  
10 uniform, in a marked Chevy Tahoe. He was working with USBP Agent Sanders.

11 At about 7:00 a.m. or 7:30 a.m. Agent Schultz received a radio call from dispatch  
12 regarding sensor activity in the brush on the west side of Industrial Park Avenue, near  
13 Target Range Road. There are interdictions of drugs or undocumented aliens in that area,  
14 as depicted in Government's Exhibit 4, every month or two. In his experience, scouts are  
15 placed in that area before loads of drugs or undocumented people arrive. The scouts are  
16 usually on cell phones. When the agents received the call from dispatch, they went to the  
17 area and walked in the wash and through the trees, but they didn't encounter anyone. Half  
18 an hour later, there was more sensor activity. Ten minutes later, dispatch advised the  
19 agents that a daycare center in the area received a call about people hiding in the brush  
20 nearby.

21 The agents responded and saw two people near Bustamante Refrigeration. They were  
22 not talking on cell phones. Agent Schultz testified that they were the only people in the  
23 area.

24 When the agents arrived, he saw two people walk behind the little pillar on the right of  
25 the photograph in Exhibit 1 and position themselves behind a white wall that Schultz  
26 estimates is 5 to 6 feet tall. Agent Schultz couldn't remember how visible the men were  
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1 once behind the wall, but they appeared to hide when the agents approached. Agent  
2 Schultz found that suspicious.

3 The agents approached the two men and identified themselves as USBP agents. Agent  
4 Schultz determined that the men spoke Spanish and asked if they were U.S. citizens. They  
5 responded that they were not. When Schultz asked for identification, each man presented  
6 a B1/B2 visa. They said they were here to work, but they did not know what type of work  
7 they were looking for. They said they were not looking for work at Bustamante's. Agent  
8 Schultz spoke in a normal tone of voice. He stood about four to five feet from the men.

9 Schultz testified that a B1/B2 visa does not confer work rights. It is for visitors and  
10 travelers. During this encounter, the defendant's companion, Mr. Quijada-Quijada, was  
11 fidgety and avoided eye contact. The defendant smiled and avoided eye contact but was  
12 relaxed and seemed to be amused by the encounter. The conversation lasted two to three  
13 minutes, and then the men were told they were free to leave. Schultz identified the  
14 defendant in the courtroom. He admitted that the details of the contact with the defendant,  
15 which occurred nearly eight months ago, are not documented in his report. He testified  
16 that he did not remember whether Corral-Cinco had a cell phone.

17 Agent Schultz told Agent Sanders that he suspected the men were scouts based on the  
18 visas, their answers to the questions, and their behavior. Scouts don't always use cell  
19 phones. They can use hand signals, mirrors, lights or radios to communicate, although  
20 there was no testimony that any of that occurred in this case. Sanders walked behind the  
21 warehouse. The men walked south towards the border, which is about one-half mile away  
22 or about one mile if travelling on the roads to the DeConcini Port of Entry. Schultz saw  
23 both men turn and look at him. One of the men then turned and looked again.

24 A couple minutes after the men walked away from the agents, Sanders called Schultz  
25 and told him to meet back near the warehouse because he had a white pickup truck loaded  
26 with drugs. He also asked Schultz to stop the men. Schultz got in his vehicle and drove  
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1 up next to the men. He got out of his vehicle and said he needed to ask them a few more  
2 questions because they found something. Schultz asked the men to get into his vehicle.  
3 He opened the door and the men got into the area with the metal cage, with doors that  
4 cannot be opened from the inside. Schultz shut the door. None of these details are in his  
5 report. Schultz testified that he did not place handcuffs on the men. He usually does not  
6 handcuff suspects or arrestees when transporting them, depending on the individuals.

7 As he approached the men, Schultz called for more agents. Additional agents arrived  
8 as soon as the men were in the vehicle. Schultz drove the men for about 30 seconds and  
9 parked near the white truck. That was 100 to 200 feet from where the initial encounter  
10 occurred.

11 Government's Exhibit 8 (camera 1) shows four USBP vehicles arriving behind the  
12 warehouse within less than two minutes of each other, with at least one of the vehicles  
13 using its emergency lights. A number of people get out of the vehicles and are seen  
14 walking around the area. Presumably they are agents. Within five minutes, a dark SUV  
15 also arrives. It is unclear if that is a law enforcement vehicle.

16 Agent Schultz testified that he separated the men by placing Quijada-Quijada in another  
17 marked vehicle. The defendant remained in the back of the Tahoe with the door open and  
18 his legs outside the vehicle. He read the defendant his rights from a card in Spanish.  
19 Agent Sanders witnessed the advisal. Schultz then asked the defendant why he was in the  
20 area. He asked whether Corral-Cinco's response that he was there to work was the truth.  
21 The defendant shook his head "no." He admitted that he knew there was marijuana in the  
22 white truck and that he came from Mexico to transport the marijuana. The defendant said  
23 that he had the key to the truck in his pocket. He stated that Quijada-Quijada also knew  
24 about the marijuana and came from Mexico to transport it. Schultz took the defendant out  
25 of the Tahoe and handcuffed him behind his back. He conducted a pat down, removed the  
26 key from the defendant's pocket, and gave it to Sanders. Two to three minutes passed from  
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1 the time the defendant entered the Tahoe and when he was handcuffed. Schultz used no  
2 physical force, did not raise his voice and did not brandish his weapon during questioning.

3 Jaciel Corral-Cinco

4 Jaciel Corral-Cinco testified that he crossed into the United States on foot on 11/30/15 at  
5 maybe about 7:00 a.m. with his friend, Quijada. The men walked to Bustamante's and  
6 were standing by the door identified in Defendant's Exhibit 8, talking to a lady, when the  
7 agents arrived. Corral-Cinco doesn't remember the name of the lady and does not have  
8 her telephone number. She was an older lady. They spoke for three to five minutes about  
9 finding work. The lady told them she was not in charge and did not do the hiring. They  
10 were walking away when Corral-Cinco saw the agents approaching. They continued  
11 walking until the agents told them to stop. They did not try to hide.

12 The men were asked for their documents, which they gave to the agents. The agents  
13 asked Corral-Cinco to remove all his belongings, advising him that he was going to be  
14 searched. He took his wallet, cell phone, and cigarettes out of his pockets but did not turn  
15 over the key to the truck because he forgot. The agent searched all his pockets, including  
16 his sweater pocket where the key was, but did not remove the key. The testimony about  
17 being asked to remove all belongings and being searched during the first encounter is not  
18 credible. A search would have revealed the key in Mr. Corral-Cinco's pocket. It is not  
19 credible that Corral-Cinco forgot about the key which he likely knew was linked to a truck  
20 involved in criminal activity. Corral-Cinco testified he had no plan to drive the truck, but  
21 he received the key before entering the United States. He testified that he spoke with a  
22 woman about work, but his possession of the key indicates that he was not in the United  
23 States seeking legitimate work.

24 The agents asked what the men were doing there. Corral-Cinco's friend answered. The  
25 agents told the men to retrieve their belongings and that they were free to leave.  
26 Corral-Cinco testified that he made eye contact and was not nervous. The encounter was  
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1 brief. Corral-Cinco and Quijada left the area because Corral-Cinco was intimidated and  
2 thought he couldn't be there because of the agent's harsh tone of voice. Also, he didn't  
3 see other places nearby to look for work.

4 The men walked for about five minutes when the USBP car made a u-turn and stopped  
5 next to them. The agent got out of the vehicle, told the men to sit on the ground and  
6 handcuffed them once they were on the ground. That testimony is not credible in light of  
7 Agent Schultz's testimony that he removed Corral-Cinco from the car so he could handcuff  
8 him from behind as he stood facing the vehicle, once they arrived back at the warehouse.

9 Corral-Cinco testified that another car arrived and two or three more agents arrived on  
10 foot. Corral-Cinco was told to get up and get in the first agent's car. His friend was told  
11 to get into another car. The men were driven to an area where there were several cars and  
12 officers waiting near a white truck with marijuana bundles. Corral-Cinco was left in the  
13 car. The agents walked around and then returned and told Corral-Cinco to get out of the  
14 car. He was still in handcuffs. They searched him again and took the key, which was given  
15 to another agent who used it to start the truck. The agents removed all his other  
16 belongings, threw them on the ground and placed Corral-Cinco back in the Tahoe. They  
17 read him his rights, which he understood.

18 Corral-Cinco denies being questioned or making any statements. He doesn't  
19 remember being asked if he had the key to the truck or if he knew about the truck. He did  
20 not try to hide when the agents arrived. He did not look back at the agent after he was free  
21 to leave.

## 22 **DISCUSSION:**

### 23 The Initial Encounter

24 The defendant argues that he was stopped and questioned by police without reasonable  
25 suspicion, in violation of his Fourth Amendment rights. The government characterizes  
26 the initial contact as a consensual encounter lasting only a couple of minutes, in a public  
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1 place, free from threats or force, during which the defendant was free to leave and gave  
2 voluntary answers to questions. The Court disagrees with both parties.

3 The stop here is properly characterized as an initial inquiry followed by a brief  
4 investigatory detention. To justify an initial inquiry and a brief investigatory detention,  
5 there must be reasonable suspicion that criminal activity may be afoot. *Terry v. Ohio*, 392  
6 U.S. 1, 30 88 S.Ct. 1868, 1884 (1968). That level of suspicion is considerably less than  
7 proof of wrongdoing by a preponderance of the evidence, and is less demanding than  
8 probable cause. *United States v. Sokolow*, 490 U.S. 1, 6, 109 S.Ct. 1581, 1585 (1989)  
9 (citations omitted). Yet, it is also more than an inchoate and unparticularized suspicion or  
10 mere hunch, and requires that the officer articulate facts supporting his suspicion. *Id.*

11 USBP Agents Sanders and Schultz were investigating a report of individuals hiding in  
12 the brush near a preschool, less than a mile from the border, in an area known for drug and  
13 human trafficking. They were told that there was sensor activity in that area. They  
14 responded and found the defendant and his companion, who walked away when the agents  
15 arrived. No one else was in the area near the warehouse.

16 The agents told the men to stop. They questioned the men, who provided answers that  
17 the agents found suspicious. The defendant's companion was fidgety and nervous. The  
18 agents took their immigration documents, holding them until the men were free to leave.  
19 Prior to being told they were free to leave, a reasonable person would not feel free "to  
20 disregard the police and go about his business." *California v. Hodari D.*, 499 U.S. 621,  
21 628 (1991). The encounter was not voluntary. It was a brief, investigatory detention  
22 based on reasonable suspicion. The initial stop was lawful.

### 23 The Second Encounter

24 The government states that the second stop was either a *Terry* stop, justified by  
25 reasonable suspicion, or a lawful arrest supported by probable cause. The defendant  
26 argues that there was neither reasonable suspicion nor probable cause to stop the defendant  
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1 a second time. The Court finds that the stop was a *Terry* stop, and was based on  
2 reasonable suspicion. *See Terry* and *Sokolow, supra*. Only after the defendant was  
3 transported back to the warehouse and handcuffed was he under arrest.

4 The Fourth Amendment protects people against unreasonable searches and seizures  
5 and requires probable cause to support a warrantless arrest. *Maryland v. Pringle*, 540  
6 U.S. 366, 369-70, 124 S.Ct. 795, 799 (2003). Probable cause is based on the totality of the  
7 circumstances and exists when a reasonably cautious person could conclude that there is a  
8 fair probability that a specific person committed a crime. *U.S. v. Ortiz-Hernandez*, 427  
9 F.3d 567, 573 (9<sup>th</sup> Cir. 2001), *cert. denied*, 127 S.Ct. 358 (2006). The standard for  
10 probable cause is not terribly demanding. *U.S. v. Collins*, 427 F.3d 688, 691 (9<sup>th</sup> Cir.  
11 2005). Examining the totality of the circumstances requires a two-prong analysis. The  
12 Court must determine the intrusiveness of the stop from the defendant's perspective, and  
13 the justification for the officer's conduct from the law enforcement point of view. *U.S. v.*  
14 *Edwards*, 761 F.3d 977, 981 (9<sup>th</sup> Cir. 2014).

15 The Court in *Edwards* explains that in analyzing the first prong, the level of  
16 intrusiveness, the court must determine whether a reasonable, innocent person would feel  
17 free to leave after some brief questions under the circumstances under review. The basis  
18 for the second prong is that an officer should not have to fear for his safety during an  
19 investigation. It compels the court to decide whether there was a sufficient basis to justify  
20 an officer's safety concerns and the level of intrusion employed to allay those fears. *Id.*

21 In the present case, the defendant was stopped on the side of the road, walking south  
22 toward the border. Agent Schultz told him and his companion that he had a few more  
23 questions because they found something. He asked the men to get into the back seat of the  
24 Tahoe. The men complied. They were not handcuffed. They got into the locked,  
25 caged area together. They were transported for 30 seconds. A reasonable, innocent  
26 person would believe he was going to be questioned briefly about whatever the agents  
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1 found in the area where the first encounter took place, and would then be free to leave, as  
2 had just occurred minutes earlier. The intrusiveness of the stop, the first prong, favors a  
3 finding that the defendant was not under arrest at that time.

4 Agent Schultz did not testify that he was in fear for his safety when he re-contacted the  
5 two men. He called for backup as he approached the men, presumably because there were  
6 two of them and only one agent. Multiple agents arrived at his location once the men were  
7 secured in the back of the Border Patrol vehicle. The reason Agent Schultz decided to  
8 secure and transport the men was because of the proximity to the border. He did not want  
9 the men to run across the border. The second prong is neutral.

10 The analysis then turns to whether probable cause was developed between the first  
11 encounter and the arrest. Once the defendant admitted that he was not in the area looking  
12 for work, and that he had the key to the marijuana-laden truck, there was probable cause to  
13 arrest him. Agent Sanders discovered the white pick-up truck loaded with marijuana  
14 about 100 to 200 feet, and a one minute walk, from where the defendant and his companion  
15 were originally encountered.

16 Based on the totality of the circumstances, a reasonably cautious person could  
17 conclude that there is a fair probability that Defendant Corral-Cinco committed a crime.

18 Any statements or evidence obtained as a result of the lawful arrest should be admitted  
19 at trial.

## 20 **RECOMMENDATION**

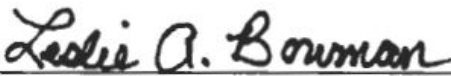
21 In view of the foregoing, it is recommended that, after its independent review of the  
22 record, the District Court **DENY** the motion to suppress evidence. (Doc. 25)

23 Defense counsel may serve and file written objections within 14 days. If objections are  
24 not timely filed, the party's right to de novo review may be waived. No reply to objections  
25 shall be filed unless leave is granted from the District Court.

26 The Clerk of the Court is directed to send a copy of this Report and Recommendation to  
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1 all parties.

2 DATED this 6th day of September, 2016.

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5 Leslie A. Bowman  
6 United States Magistrate Judge  
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